

1 **Education Cabinet**

2 **Kentucky Board of Education**

3 **Department of Education**

4 **(Amendment)**

5 **702 KAR 6:100. Appeal procedures for nutrition and health services [~~school and~~**
6 **~~community nutrition~~] programs.**

7 RELATES TO: KRS 156.070(5), 156.160(1)(f), 7 C.F.R. 210.18(q), 215.11, 220.13(f)(2),
8 225.13, 226.6(k), 42 U.S.C. 1761, 1766(e), 1772

9 STATUTORY AUTHORITY: KRS 156.029(7), 156.070(5)

10 NECESSITY, FUNCTION, AND CONFORMITY: KRS 156.070(5) requires the
11 Kentucky Board of Education to promulgate administrative regulations governing the
12 operation of programs within the Department of Education. This administrative
13 regulation establishes the appeals procedure for a sponsor of a federal nutrition program.

14 Section 1. Actions that May be Appealed. (1) A school food authority that sponsors the
15 National School Lunch Program, the Special Milk Program or the School Breakfast
16 Program may appeal the following adverse actions:

17 (a) Denial of all or part of a claim for reimbursement arising from administrative or
18 follow-up review activity; or

19 (b) Withholding payment arising from administrative or follow-up review activity.

20 (2) A sponsor of the Child and Adult Care Food Program, including an independent
21 center or sponsoring organization on behalf of a facility under its jurisdiction, and

1 responsible principals and responsible individuals, may appeal the following adverse
2 actions:

3 (a) Denial of a new or renewing institution's application for participation;

4 (b) Denial of an application submitted by a sponsoring organization on behalf of a facility
5 or site;

6 (c) Notice of proposed termination of participation of an institution or facility or site;

7 (d) Suspension of an institution's agreement;

8 (e) Denial of an institution's application for start-up payments;

9 (f) Denial of an advance payment;

10 (g) Denial of all or part of a claim for reimbursement [~~except for a late claim~~];

11 (h) Notice of proposed disqualification of a responsible principal or a responsible
12 individual;

13 (i) Recovery of all or part of an advance in excess of the claim for the applicable period;

14 (j) Decision by the Department of Education not to forward to Food and Nutrition Service
15 (FNS) an exception request by an institution for payment of a late claim, or a request for
16 an upward adjustment to a claim;

17 (k) Demand for the remittance of an overpayment; or

18 (l) Any other action of the Department of Education affecting the participation of an
19 institution in the program or the institution's claim for reimbursement.

20 (3) A program sponsor or a food service management company (FSMC) participating in
21 the Summer Food Service Program for Children may appeal the following adverse
22 actions:

23 (a) Denial of an application for participation;

- 1 (b) Denial of a sponsor's request for an advance payment;
- 2 (c) Denial of a sponsor's claim for reimbursement [~~except for a late claim under 7~~
3 ~~C.F.R. 225.9(d)(5)~~];
- 4 (d) Refusal of a state agency to forward to FNS an exception request for payment of a
5 late claim or a request for an upward adjustment to a claim;
- 6 (e) A claim against a sponsor for remittance of a payment;
- 7 (f) Termination of the sponsor or a site;
- 8 (g) Denial of a sponsor's application for a site; or
- 9 (h) Denial of a food service management company's application for a registration or the
10 revocation of a food service management company's registration.

11 Section 2. Filing An Appeal. (1) A program sponsor, responsible principal, or responsible
12 individual aggrieved by an adverse action of the Division of Nutrition and Health
13 Services [~~School and Community Nutrition~~] (the "division") may appeal the action by
14 filing a timely request for an appeal. The request shall be filed with the Director, Division
15 of Nutrition and Health Services [~~School and Community Nutrition~~], Department of
16 Education, 2545 Lawrenceburg Road, Frankfort, Kentucky 40601.

17 (2) The request shall be in writing and clearly state:

- 18 (a) The name and address of the program sponsor;
- 19 (b) The name and title of the person who signed the request;
- 20 (c) The adverse action being appealed, the basis of the appeal, and the relief or remedy
21 sought;

1 (d) The date of the letter or other written communication from the division notifying the
2 program sponsor of the proposed adverse action, and the name and title of the division
3 official who signed the letter or communication; and

4 (e) If a hearing before a hearing officer is desired, the desire for a hearing.

5 (3)(a) An appellant program sponsor may submit written information in support of its
6 position when it files its appeal and request for a hearing. Except as provided in
7 paragraph (b) of this subsection, it may also submit additional written information to the
8 designated hearing officer up to thirty (30) calendar days after receipt of the division
9 notice of adverse action.

10 (b) If the appellant program sponsor is the Summer Food Service Program, it may submit
11 additional written information in support of its position up to seven (7) calendar days
12 after filing the appeal and request for a hearing.

13 Section 3. Appeal Timelines. (1) The request for appeal shall be postmarked or received
14 by the division prior to midnight of the fifteenth calendar day (or tenth working day if the
15 Summer Food Service Program) after receipt of the notice of adverse action. If the 15th
16 day (or tenth working day if the Summer Food Service Program) falls on a Saturday,
17 Sunday, or federal legal holiday, the request shall be timely if it is postmarked or
18 received the next day which is not a Saturday, Sunday, or federal legal holiday.

19 (2) The division shall acknowledge receipt of the request for an appeal within ten (10)
20 days of its receipt of the request.

21 (3) Any information on which the division's action was based shall be available for
22 inspection by the institution and the responsible principal and responsible individual from
23 the date of receipt of the request for an appeal.

1 Section 4. Appeal Procedures. (1) The division shall forward any request for appeal to the
2 Director, Division of Administrative Hearings, Office of the Attorney General. The
3 request for appeal shall be accompanied by a copy of the notice of adverse action sent by
4 the Division [~~of School and Community Nutrition~~].

5 (2) During the appeal process, a program sponsor, responsible principal, responsible
6 individual or food service management company shall:

7 (a) Self-represent;

8 (b) Be represented by legal counsel; or

9 (c) Be represented by another person.

10 (3) The administrative hearing procedures of KRS Chapter 13B shall apply.

11 (4) If a hearing is requested:

12 (a) Except as provided in subsection (7) of this section, the institution, the responsible
13 principal and responsible individual, and the Department of Education shall be provided
14 with at least ten (10) days advance notice of the time and place of the hearing;

15 (b) If the institution's representative or the responsible principal and responsible
16 individual or their representative fail to appear at the scheduled hearing, the right to a
17 personal appearance before the designated hearing officer shall be waived unless the
18 designated hearing officer agrees to reschedule the hearing; and

19 (c) A representative of the state agency shall be allowed to attend the hearing to respond
20 to the testimony of the institution and the responsible principal and responsible individual
21 and to answer questions posed by the designated hearing officer.

22 (5) The designated hearing officer shall make a determination based solely on the
23 information provided by the state agency, the institution, and the responsible principal

1 and responsible individual and based on federal and state laws, administrative
2 regulations, and policies and procedures governing the program.

3 (6) Except as provided in subsection (7) of this section, within sixty (60) days of the
4 Department of Education's receipt of the request for an appeal, or ten (10) days if the
5 matter under appeal is a suspension of participation, the designated hearing officer shall
6 inform the Department of Education, the institution's executive director and chairman of
7 the board of directors, and the responsible principal and responsible individual of the
8 outcome of the appeal.

9 (7) If the appellant is the Summer Food Service Program:

10 (a) The notice of the time and date of the hearing shall be provided at least five (5) days
11 prior to the hearing, with the notice sent by certified mail, return receipt requested;

12 (b) The hearing shall be held within fourteen (14) days of the date of receipt of the
13 request for an appeal and hearing, but not before the appellant's written documentation is
14 received;

15 (c) Within five (5) working days after the appellant's hearing, or within five (5) working
16 days after receipt of written documentation if no hearing is to be held, the designated
17 hearing officer shall make a determination based on a full review of the administrative
18 record, and inform the appellant of the outcome of the appeal by certified mail, return
19 receipt requested; and

20 (d) The Department of Education's action shall remain in effect during the appeal process
21 except if it is an appeal of termination. If it is an appeal of termination:

1 1. Participating Summer Food Service Program sponsors and sites may continue to
2 operate the program during the appeal, except as provided by subparagraph 3 of this
3 paragraph;

4 2. Reimbursement shall be paid for meals served during the appeal process if the appeal
5 results in the overturning of the Department of Education's decision; and

6 3. Continued program operation shall not be allowed if the Department of Education's
7 action is based on imminent danger to the health or welfare of children. If the Summer
8 Food Service Program sponsor or site has been terminated for this reason, the Department
9 of Education shall specify this in its notice of adverse action. Pursuant to 7 C.F.R.
10 210.18(q)(9), 220.13(f)(2), 225.13(b)(12) and 226.6(k)(5), the decision of the hearing
11 officer shall be the final administrative determination.

12 (8) If an application to participate in the program was denied, the determination of the
13 hearing officer shall either sustain the denial or shall direct that the appellant be approved
14 for limited or full participation.

15 (9) If all or part of a claim for reimbursement, start-up payment, advance payment, or
16 demand for refund of any overpayment was denied, the determination of the hearing
17 officer shall either sustain the action under appeal or specify the amount of the claim for
18 reimbursement, start-up payment, advance payment, or refund of overpayment to be paid.

19 (10) If an appellant's participation in the program was terminated, the determination of
20 the hearing officer shall either sustain the termination or shall direct that the appellant be
21 permitted to continue participation in the program.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the Kentucky Board of Education, as required by KRS 156.070(4).

(Date)

Gene Wilhoit
Commissioner of Education

(Date)

Keith Travis, Chairperson
Kentucky Board of Education

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this proposed administrative regulation shall be held on September 28, at 10:00 a.m. in the State Board Room, 1st Floor, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky. Individuals interested in being heard at this meeting shall notify this agency in writing five working days prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until October 2, 2006. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to Kevin M. Noland, Deputy Commissioner and General Counsel, Bureau of Operations and Support Services, Kentucky Department of Education, 500 Mero Street, First Floor, Capital Plaza Tower, Frankfort, Kentucky, 40601, phone 502/564-4474, fax 502/564-9321.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation: 702 KAR 6:100

Agency Contact Person: Kevin M. Noland

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes the procedure for appealing adverse actions taken against sponsors of the Special Milk Program, School Breakfast Program, National School Lunch Program, Child and Adult Care Food Program and Summer Food Service program for Children.

(b) The necessity of this administrative regulation: This administrative regulation was necessary to implement provisions of the National School Lunch Act of 1946, the Child Nutrition Act of 1966, the Agricultural Risk Protection Act of 200 and the Grain Standards and Warehouse Improvement Act of 200, as amended.

(c) How this administrative regulation conforms to the content of the authorizing statute: This administrative regulation provides the specifics for the appeal process for sponsors of the programs listed above, including what actions may be appealed, how to file an appeal, and the timelines for appeals, hearings and decisions.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides the specifics for the appeal process for sponsors of the programs listed above, when an “adverse action” as defined by the regulation, has been taken against them by the Department of Education.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: It expands the grounds for appeal, allowing appeals for denial of payment of a late claim for reimbursement and it inserts the current name of the pertinent division at the Kentucky Department of Education.

(b) The necessity of the amendment to this administrative regulation: Required by a decision of the federal cognizant agency.

(c) How the amendment conforms to the content of the authorizing statute: Not applicable with this amendment.

(d) How the amendment will assist in the effective administration of the statutes: It clarifies that sponsors may appeal denial of payment of a late claim for reimbursement.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: Sponsors of the programs listed in 1(a) above, including school districts; child care centers; private and parochial schools; and faith-based organizations.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including: Sponsors will be allowed to appeal the denial of a late claim for reimbursement.

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: None

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional cost

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Providers will now be able to appeal the denial of reimbursement of a late claim.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There will be no additional costs to the agency to implement this administrative regulation. We do not expect that the amendment will increase the number of appeals.

(b) On a continuing basis: None.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Federal funding granted to the state agency that can be used for this purpose.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No increase in fees or funding will be necessary to implement this administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation does not establish fees or directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 702 KAR 6:100

Contact Person: Kevin Noland

1. Does this administrative regulation relate to any program, service, or requirements of a state or local government (including cities, counties, fire departments, or school districts)? Yes

If yes, complete questions 2-4.

2. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? School districts

3. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. 7 CFR 210.8(b)(1); 215.10(b); 220.11(b); 225.9(d)(6); and 226.10(e)

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. No additional expense to school districts

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None

(c) How much will it cost to administer this program for the first year? The proposed amendment will require no additional cost

(d) How much will it cost to administer this program for subsequent years? The proposed amendment will require no additional cost

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): None

Expenditures (+/-): None

Other Explanation: